SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 896

ALAMO EXPRESS, INC. AND ALAMO CARTAGE COMPANY,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alamo Express, Inc. and Alamo Cartage Company petition for a writ of certiorari to review the judgment, decision and order of the Court of Appeals for the Fifth Judicial Circuit enforcing an order of the National Labor Relations Board requiring, *inter alia*, Petitioners to offer full reinstatement to the former or substantially equivalent positions of employment previously held by two employees and to make them whole for any loss of pay suffered by them as a result of their discharge.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is No. 28,383 of the Fifth Circuit Court of Appeals decided July 15, 1970. Judgment was entered on August 6, 1970 (Appendix B). The findings of fact, conclusions of law, and order of the Board are reported at 170 NLRB No. 26.

JURISDICTION

Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Due process of law has been denied Petitioner.

(A) Whether the Board's decision, et seq., the Court's decision is supported by substantial evidence.

(B) May the Court arbitrarily isolate one factor only, not supported by evidence, for consideration in showing the necessity of the Employer's business interest as opposed to an employee's activity in refusing to cross a picket line of another union than his own at another plant than his own employer.

(2) Whether the National Labor Relations Board and the courts can grant employees the protection of the National Labor Relations Act when this protection interferes with and prevents a motor carrier from per-

forming its duty of service to the public as required in the Motor Carrier Act of 1935.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), specifically 29 U.S.C. 157, 29 U.S.C. 158(a) (1) and (3). (See Appendix C.)

STATEMENT OF THE CASE

A. *The Board's Findings of Fact:*

The National Labor Relations Board found, in adopting the Trial Examiner's Decision, that one employee, Rodney, a truckdriver for Petitioners, was instructed to make a freight pickup at the premises of Southwestern Pipe Company in Houston, Texas. When he arrived there, he saw a group of pickets and ascertained that they were on strike against Southwestern. The striking union there was not the union involved with his own employer. When the driver, Rodney, advised his dispatcher of this fact, his call was switched to the vice president in charge of operations, who told him that the pickets there had nothing to do with either Alamo Express, Inc. or Alamo Cartage Company, and that he should cross the line. The driver advised him that he would refuse to cross the picket line, and the vice president told him, "If a man can't cross a picket line, I can't use him." When the driver returned to the terminal, his discharge was confirmed.

Another driver, one Jefferson, was then assigned to pick up the merchandise at Southwestern, and Jefferson also refused to cross it, and so advised his employer. He also was discharged.

In its conclusions that the company acted unlawfully in the discharge of these two drivers, the Board weighed the case of *Overnight Transportation Company*, 154 NLRB 1271, enf'd. (C.A.D.C.) 364 F.2d 682, against *Red Wing Carriers, Inc.*, 137 NLRB 1545; 325 F.2d 1011. The Board followed the *Overnight* case, holding:

> As in *Overnight*, and in contrast with *Red Wing*, Rodney and Jefferson had no permanent assignments, but picked up and delivered merchandise as the occasion arose. It required no revision of Respondent's methods of operation to dispatch Jefferson in place of Rodney, as it did another driver in place of Jefferson. Granted that this may have been an inconvenience, I find it short of overcoming the employees' countervailing right of concerted, collective activity.

B. *The Decision of the Court of Appeals:*

In affirming, the Court recognized the well-settled proposition that an employee's activity must be balanced against the specific business interests of his employer, citing *Overnight Transportation Company*. The Court, however, went on to say:

> In striking this balance, an important evidentiary factor to be considered in showing the necessity of the employer's business interests is whether the employer or his foremen sought to replace the discharged employees with other employees who were willing to cross the picket line. *Overnight, supra.* There as [was] no evidence that the two men were eventually replaced by an employee willing to cross the picket line. Nor was the pickup or delivery to this particular site within a permanent route or special skill of either Rodney or Jefferson such that no one would have been capable of replacing them. *Cf. Red Wing Carriers, Inc.*, 137 NLRB 1545. It was a routine pickup, which, as the Trial Examiner found, could have been performed by any of Alamo's other employees at the Houston terminal.

REASONS FOR GRANTING THE WRIT

Both the Board and the Court failed to take into consideration pertinent facts which weigh heavily in favor of the Employer when balancing the employee's activity against the Employer's specific business interests.

Both employees had crossed picket lines in the regular course of their employment before the incident leading to the discharge. Their employer had no reason to believe that they would not continue to do so.

The Trial Examiner found, and the Court upheld, that reassigning drivers to make the pickups refused by Rodney and Jefferson were no more than "slight inconvenience" to the Employer. They failed or refused to take into consideration that drivers are assigned to various areas of a town, and it is more than "inconvenience" to assign a driver from another area of town to go to a particular location to make one pickup. This not only interferes with the regular work of the other employees, creating delays in pick-ups and deliveries, customer dissatisfaction, additional and unnecessary expenses, but also subjects the carrier to the possibility of revocation of Interstate Commerce Commission authorities.

The question of replacement and termination, discharge or otherwise, is of no value here. The semantics of what happened to Rodney and Jefferson, whether they were replaced, fired, terminated or what happened to them, renders a serious question silly in its resolution. *N.L.R.B.* v. *L. G. Everist, Inc.*, 334 F.2d 312. If Petitioner had a duty to serve the public and the refusal of its employees to carry out this duty is clearly shown here, then Petitioner had a right to hire employees who would carry out its policy of service to its customer.

Despite the Court's notice of the important evidentiary factor to be considered (whether the employer or his foremen sought to replace the discharged employees with other employees who were willing to cross the picket line), and their holding that there was no such evidence, the evidence is quite clear that these

two employees were replaced and that they were replaced within a two-day period. This evidence is found at Page 945 and 946 of the Appendix before the Court below. It is also found at Pages 1259 and 1260 of the transcript of record of the trial before the Board. *Obviously, these employees were replaced, and were replaced by employees willing to cross the picket line.*

Said this Court in *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474 at 496:

> In reviewing Board findings, the courts have a duty to consider not only evidence tending to support the Board, but evidence conflicting with such findings since "substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The Court obviously did not take into account this evidence of replacement of the employees.

The parent case on the right of an employer to terminate an employee who refuses to cross the picket line of a customer is *N.L.R.B.* v. *Rockaway News Supply Company*, 197 F.2d 111. The Court stated at Page 113:

> In other words, an employee is, of course, free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtedlessly be a violation of Section 8(a) (1). But he is not free to exercise the right during his working

> time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line. To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which is well settled he may not do.

A thorough discussion of *Rockaway News* and issues of this matter are discussed in *N.L.R.B.* v. *L. G. Everist, Inc., supra.*

In weighing the balance between the employees' protected activities and the Employer's specific business interests, it must be taken into account that the two employees involved misled their Employer as to whether they would or would not cross picket lines when they earlier and on previous occasions crossed all picket lines.

Employees cannot be permitted to choose at their will when they will or when they will not work. The courts have held that an employee's action in refusing to work overtime constitutes a "partial strike" for which discharge is justified. *N.L.R.B.* v. *G. C. Conn*, 108 F.2d 390. An employer is justified in discharging an employee who remains at work but refuses to process material. *N.L.R.B.* v. *Montgomery Ward*, 157 F. 2d 486. If these employees had refused to cross picket lines before or had announced that they would not cross picket lines, their employer would have been saved considerable expense and inconvenience. The holding of the Board and the Court in this instance

gives any employee the absolute right to decide for himself when and if he will cross a picket line and work for his employer under any circumstances, and thus removes any balancing between the two interests.

The Court also found in support of this holding evidence of anti-union animus at the time of these two discharges. They noted that Rodney had served as an observer on the day of the election, but this activity had taken place a year before and should be considered so remote as to be unimportant. Moreover, Jefferson had engaged in no union activities, but he likewise was discharged. The other evidence of anti-union animus was totally and completely unrelated to the discharge of Rodney and Jefferson.

There is a conflict here between the Order of the National Labor Relations Board protecting the jobs of employees who invoke the right extended by the National Labor Relations Act to recognize a picket line or labor dispute on the premises of employers other than that of the common carrier involved here and the duty of the carrier to serve the public as required by the Motor Carrier Act of 1935, 49 U.S.C. 301 *et seq.* The Interstate Commerce Commission can revoke the authority of a carrier who fails to serve the public as required in that statute. 49 U.S.C. 304(c). Clearly a carrier must have the right to discipline employees who refuse to perform services compatible with this imposed obligation.

A carrier cannot effectively consent not to handle the goods of a shipper. *United Brotherhood of Car-*

penters and Joiners v. N.L.R.B., 357 U.S. 93. The carrier can be subject to action in damages for such failure. *Minneapolis St. Louis Ry.* v. *Pacific Company*, 215 F.2d 126. Yet, a carrier is prevented in the instant case from discipline or terminating an employee who refuses to perform such services, even though this is a breach of the carrier's rule. This is truly a failure on the part of the Labor Board to accommodate its rulings with the requirements of the Interstate Commerce Commission Act as required by this Court in *Burlington Truck Lines* v. *United States*, 371 U.S. 156. Clarification of this conflict in enforcement of statutes requires the review of this case by this Honorable Court.

CONCLUSION

The petition for writ of certiorari should be granted.
DATED, Dallas, Texas, _____, 1970.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the Supreme Court of the United States, hereby certify that three copies of this Petition for a Writ of Certiorari has been served upon opposing counsel by depositing the same, properly addressed, in the United States Mail, postage prepaid at Dallas, Texas, this ____ day of October, 1970.

Allen P. Schoolfield, Jr.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28,393

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ALAMO EXPRESS, INC. and ALAMO CARTAGE COMPANY,
Respondents.

Application for Enforcement of an Order of The National Labor Relations Board (Texas Case)

(July 15, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This is an appeal by the National Labor Relations Board (hereinafter Board) pursuant to Section 10(e) of the National Labor Relations Act (hereinafter the Act), 29 U.S.C. §160(e), for

enforcement of its order issued March 13, 1968, against Alamo Express, Inc. and Alamo Cartage Company (hereinafter Alamo).[1] We find from the record that there is substantial evidence to support the Board's order, and it is therefore enforced.

Alamo is engaged in intrastate transportation of freight by truck in Texas.[2] It employs over 400 employees and has offices and terminals in several southern Texas towns, with its home office in San Antonio, Texas. The union in this case is a conglomerate of three Teamster locals.[3] There is no question that it constitutes a labor organization within the meaning of the Act.

There are two unfair labor practices charged in this case:

(1) That Alamo violated Section 8(a)(5) of the Act (29 U.S.C. 158) for refusing to bargain with the Union, and (2) That Alamo violated Section 8(a)(1) and (3) of the Act (29 U.S.C. 158) by discriminatorily discharging four of its employees.

These two charges will be treated separately below.

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[1]The Board's Decision and Order are reported in 170 NLRB [illegible].

[2]The jurisdiction of the Board is not questioned in this case.

[3]General Drivers, Warehousemen and Helpers Local Union Nos. 968, 657 and 490, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. (Herein Union).

REFUSAL TO BARGAIN

Following repeated unsuccessful attempts to organize Alamo, the Union filed a petition with the Board on July 6, 1965, requesting a representation election among Alamo's employees. The Union and Alamo, with the approval of the Regional Director, agreed upon an appropriate unit, and the election was conducted on July 28 and 29, 1965. Though the initial results were 202 to 198 in favor of the Union, there were an additional 21 ballots which were challenged. Hearings were held by the Regional Director in October and November of 1965 to determine the outcome of the challenged ballots. In her report and recommendations, the Regional Director found that 13 of the 20 as yet unopened ballots should not be counted as they were cast by ineligible voters; that seven were cast by eligible voters and should be counted; and that one already-opened ballot, which contained a partial erasure was sufficiently clear to be counted also. Alamo appealed to the Board asserting that the 13 challenged ballots should be counted. The Board ruled on May 5, 1966, that the 13 ballots not be counted, that the seven be counted, and that the single ballot was too illegible to be counted. The seven ballots were opened and counted, reaffirming a union majority, 206 to 201. The Union was then certified as the bargaining representative on May 20, 1966.

Alamo subsequently refused to bargain with the Union, prompting the latter to charge Alamo with violation of Section 8(a)(5) of the Act. Before the Trial Examiner, Alamo asserted as its defense that the

certification of the Union was improper because: (1) the 13 challenged ballots should have been counted; hence, the Union's majority was not a valid one; and (2) an employee of Alamo, named Rogelio Gutierrez, was a supervisor who exerted undue influence upon his subordinate employees in favor of the Union.[4]

The Trial Examiner considered the Board's certification to be binding and that matters relating to the representation election could not be relitigated. The Board affirmed the Trial Examiner, but took under consideration the undue influence charge, and found that Gutierrez was not a supervisor at the time of the election, and that, even if he were, whatever influence he might have had on other employees was not coercive and did not in any way affect the validity of the election. The Board thus found that Alamo had violated Section 8(a)(5) of the Act.

As to the issue of the 13 ineligible voters, Alamo specifically urges that five should have been counted because the five voters were employees and not supervisors as the Board had found them to be; that two more ballots should have been counted because the two voters were employed by Alamo on the cutoff date for establishing eligibility to vote rather than thereafter; and that an additional six ballots should have been counted because the six voters were regular em-

---

[4]This alleged fact did not come to Alamo's attention until after the time for filing objections to the election had passed. For this reason, the Trial Examiner and Board properly heard arguments on this contention, even though not reviewed by the Board at the post-election hearing.

ployees eligible to vote rather than ineligible casual employees.

As to the supervisory status of the first group of five challenged voters, Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. 152 (11).

The question is one of fact and often turns on "gradations of authority ... so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of supervision". *N.L.R.B.* v. *Swift and Company*, 1 Cir., 1961, 292 F. 2d 561. Thus, as to the five employees in question here, the question is essentially whether the findings of the Board are "supported by substantial evidence on the record considered as a whole...". 29 U.S.C. 160(e). After a careful review of the record, we find that there is ample support for the Board's findings. Of the five employees in question here, each possessed at

least one of the supervisory characteristics set out in Section 2(11).

The eligibility of two of the employees (Barrera and Robinson) was based on the fact that the two men were employed on July 12 and 13 respectively when the stipulated cutoff date for eligibility of employees was July 10. The record directly bears out these facts; thus, there is substantial evidence to support the Board's finding of ineligibility.

As to the status of the remaining six ineligible voters there was much evidence produced at the hearing to prove that they worked only intermittently, on days when they were needed, prior to the July 10 cutoff date for eligibility and that they logged but a few hours even on those days. The evidence as to their casual employee status is unrefuted and amply supports the Board's finding.

With respect to Gutierrez, we find that there is substantial evidence in the record to support the Board's findings that he was not a supervisory employee and that his work at the time of the election was only that of a temporary leadman. He therefore lacked the influence capable of making his assertions in favor of the Union undue and coercive. We also agree with the Trial Examiner that even if Gutierrez were a supervisor he did not exert any pro-union pressure on his subordinates, other than statements of personal preference, such as to have a coercive effect on their vote.

Therefore, the Trial Examiner's and Board's conclusion that Alamo violated Section 8(a)(5) of the Act is affirmed and the Board's order requiring Alamo to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit is enforced.

THE DISCHARGE OF FOUR EMPLOYEES

The second charge brought against Alamo is that it discharged four employees because of their engaging in protective activity in violation of Section 8(a)(1) and (3) of the Act. The Trial Examiner found, and the Board adopted as its findings, that two of these employees (Perez and Fonteno) were discriminatorily discharged for their union activity, and that the other two (Rodney and Jefferson) were discharged for their refusal to cross a picket line. The Board ordered that Alamo offer to reinstate them and make them whole and post an appropriate notice on its premises.

Again, it is within the province of the Board to make the initial determination as to the motivation of the employer's act of discharging its employees. *United States Rubber Co.* v. *N.L.R.B.*, 5 Cir., 1967, 384 F.2d 660, *Cf.*, *N.L.R.B.* v. *Ogle Protection Service, Inc.*, 6 Cir., 1967, 375 F. 2d 497, cert. den. 389 U.S. 843. As to Perez and Fonteno, there is substantial evidence in the record as a whole to support the Board's conclusion that a motivating factor in their discharges was to discriminate against them for their known union support. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).

The other two employees in question here, Rodney and Jefferson, were discharged because of their separate refusals to cross a picket line of another union to pick up merchandise at the premises of Southwestern Pipe Company. Alamo does not deny, and the evidence clearly shows, that this refusal was the reason for the discharge of both the men. Alamo contends that the discharges were permissible under the law, where such were in the protection of its overrriding business interests. *Teamsters, Chauffeurs and Helpers Local Union No. 79* v. *N.L.R.B.*, C.A. D.C., 1963, 325 F. 2d 1011.

The refusal of an employee to cross the picket line of another union than his own at another plant than that of his employer has been held to be protected activity under Section 7 of the Act. *N.L.R.B.* v. *Rockaway News Supply Co.*, 2 Cir., 1952, 197 F. 2d 111 (dictum). However, it is equally settled that the employee's activity must be balanced against the specific business interests of his employer. *Overnite Transportation Co.*, 154 NLRB 1271 (1965). *See generally, N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26 (1967), *N.L.R.B.* v. *Mackey Radio and Tel. Co.*, 304 U.S. 333 (1938). In striking this balance, an important evidentiary factor to be considered in showing the necessity of the employer's business interest is whether the employer or his foremen sought to replace the discharged employees with other employees who were willing to cross the picket line. *Overnite*, supra. There is no evidence that the two men were eventually replaced by an employee willing to cross the picket line. Nor was

the pickup or delivery to this particular site within a permanent route or special skill of either Rodney or Jefferson such that no one would have been capable of replacing them. *Cf., Red Wing Carriers, Inc.*, 137 NLRB 1545. It was a routine pickup which, as the Trial Examiner found, could have been performed by any of Alamo's other employees at the Houston terminal. Furthermore, as the Trial Examiner so found, concurrent with these discharges was underlying hostility toward the Union on the part of Alamo, as the latter had repeatedly made known its feelings not to deal with the Union.[5]

Therefore, as to the four employees who were discharged by Alamo, the Board's order, finding violations of Section 8(a)(1) and (3) as to each discharge and requiring an offer of reinstatement, of compensating to make whole and of posting appropriate notices is

ENFORCED.

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[5]The discharges occurred on July 28, 1966, but, while a year had passed since the election, the Board had only recently certified the Union (May 20, 1966) and charges and complaints by the Union in this case were filed in June and July preceding these discharges. Other evidence of anti-union animus at the time of these two discharges was: the previous discharges of two other employees; Rodney had served as an observer on the day of the election and Alamo knew of his pro-union activities; Alamo's vice president testified, "If a man can't cross a picket line, I can't use him".

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus No. 28,393

ALAMO EXPRESS, INC. and ALAMO CARTAGE COMPANY,
Respondent.

Before: GODBOLD, SIMPSON and MORGAN, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent Alamo Express, Inc. and Alamo Cartage Company, its officers, agents, successors, and assigns on March 13, 1968. The Court heard argument of respective counsel on May 13, 1970, and has considered the briefs and transcript of record filed in this cause. On July 15, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement as sought by the Board. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said or-

der of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Alamo Express, Inc. and Alamo Cartage Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: 8-6-70

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.....